

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY DEVON HENRY,

Defendant-Appellant.

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UNPUBLISHED

May 7, 2009

No. 282663

Ingham Circuit Court

LC No. 07-000540-FH

Before: Borrello, P.J., and Murphy and M.J. Kelly, JJ.

PER CURIAM.

Defendant pled guilty to animal abandonment or cruelty, MCL 750.50(2), and four counts of owning an unlicensed dog, MCL 287.262.<sup>1</sup> The trial court sentenced defendant to two years' probation, with the first 45 days in jail, and to pay restitution in the amount of \$9,642.10. Defendant now appeals by delayed leave granted that portion of the judgment of sentence ordering restitution. We affirm defendant's convictions and sentences, vacate that portion of the judgment ordering restitution, and remand for proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court erred when it ordered restitution based upon the cost of housing and medical care for all the dogs seized from his home.<sup>2</sup> Generally, an order of restitution is reviewed for an abuse of discretion. *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006). Because defendant raises this argument for the first time on appeal, however, we review defendant's claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "Under the plain error rule, defendant must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006).

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<sup>1</sup> In return for defendant's plea, the prosecutor dismissed a charge of possession of animal fighting equipment and four other counts of owning an unlicensed dog.

<sup>2</sup> According to the record, 17 dogs were removed from defendant's property.

Defendant also argues that, in the alternative, counsel was ineffective for failing to challenge the restitution order. “Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise.” *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). “In order to overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.* Because defendant failed to move for a new trial or for a *Ginther*<sup>3</sup> hearing, appellate review is “limited to mistakes apparent on the record.” *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Defendant claims that, pursuant to the language in MCL 750.50, he should be responsible to pay only the costs of housing and care for the seized dog that formed the basis for his conviction of animal cruelty. This Court recently was faced with this very issue and held in an unpublished opinion:

MCL 750.50 governs the imposition of costs and restitution for the care and housing of animals seized and impounded pending the outcome of an action under MCL 750.50. 750.50 provides in relevant part:

(3) If an animal is impounded and is being held by an animal control shelter or its designee or an animal protection shelter or its designee or a licensed veterinarian pending the outcome of a criminal action charging a violation of this section or section 50b, before final disposition of the criminal charge, the prosecuting attorney may file a civil action in the court that has jurisdiction of the criminal action, requesting that the court issue an order forfeiting the animal to the animal control shelter or animal protection shelter or to a licensed veterinarian before final disposition of the criminal charge . . . . At the hearing, the prosecuting attorney has the burden of establishing by a preponderance of the evidence that a violation of this section or section 50b occurred. If the court finds that the prosecuting attorney has met this burden, the court shall order immediate forfeiture of the animal . . . unless the defendant . . . submits . . . an amount determined by the court to be sufficient to repay all reasonable costs incurred, and anticipated to be incurred, by the animal control shelter or animal protection shelter or the licensed veterinarian in caring for the animal from the date of initial impoundment to the date of trial. . . .

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(5) If forfeiture is not ordered pursuant to subsection (3), as a part of the sentence for a violation of subsection (2), the court may order the defendant to pay the costs of the care, housing, and veterinary medical care

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<sup>3</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

for the animal, as applicable. If the court does not order a defendant to pay all of the applicable costs listed in this subsection, or orders only partial payment of these costs, the court shall state on the record the reason for that action.

Because the prosecutor did not commence civil proceedings pursuant to MCL 750.50(3), “forfeiture [wa]s not ordered pursuant to subsection (3),” and this issue is consequently controlled by MCL 750.50(5).

According to the plain language of MCL 750.50, costs or restitution ordered under subsection (5) must be “*part of the sentence for a violation of subsection (2) . . .*” MCL 750.50(5) (emphasis added). The natural implication of this language is that costs and restitution may *only* be ordered under subsection (5) for the purpose of paying for the housing and care of animals that the defendant has been convicted of mistreating or abandoning under subsection (2). Moreover, under the plain statutory language, the court may order costs and restitution for the housing and care of “*the animal . . .*” MCL 750.50(5) (emphasis added). The word “the” is a definite article. *In re Costs and Attorney Fees*, 250 Mich App 89, 102; 645 NW2d 697 (2002). It has a ““specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an . . . .”” *Id.* (citations omitted). Therefore, the phrase “the animal” in MCL 750.50(5) contemplates only the one, particular animal that the defendant has been convicted of mistreating or abandoning under subsection MCL 750.50(2). See *id.*; see also *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). [*People v Nichiow-Brubaker*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 2007 (Docket No. 270464), slip op at 6-7.]

We find this reasoning persuasive and adopt it in this case. Accordingly, we hold that the trial court committed plain error in ordering defendant to pay restitution and costs for all of the dogs removed from defendant’s home. We thus vacate the portion of defendant’s sentence requiring the payment of \$9,642.10 in costs and restitution for all the dogs seized from defendant’s home. On remand, the trial court shall amend the amount of costs and restitution payable under MCL 750.50(5) pursuant to this opinion.

We affirm defendant’s convictions and sentences, but vacate the trial court’s restitution award and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello  
/s/ William B. Murphy  
/s/ Michael J. Kelly